that the constant application of this doctrine does not always best subserve the interests of justice or utility. A case would seem readily possible of conception in which the manufacturer of canned tomatoes had established a national reputation for the excellence of his product under a certain trade-mark, only to find that an inferior producer had adopted the same trade-mark for his canned soups.[10] It is scarcely possible to resist the conviction that the public mind would readily associate the two. Large sums of money spent in advertising the excellent product would redound to the benefit of a substantially similar one, the consumption of which might readily prejudice the ordinary buying public against the more deserving article. It is not contended that the careful buyer would be deceived, or that the practice is illegal, in the technical sense of the word; but, as a practical issue arising out of modern business conditions, it would seem at least unethical and deserving of careful scrutiny by the courts in the light of equity and justice.[11]

THE EXTENT TO WHICH A MANUFACTURER MAY CONTROL THE PRICES ON RESALE OF HIS PRODUCT.—Much litigation has resulted from attempts on the part of manufacturers to control the prices on resales of the articles manufactured by them.[1] Contracts having this effect fall under the purview of the common law principles governing restraints of trade—which phrase in its full significance, and as here used, includes restraints of competition—and also of the federal Anti-trust Act,[2] the latter operating only when the goods in question are the subject of interstate commerce.[3] In general, the right of alienation is an incident of a general property right, and restraints upon alienation are justly regarded as being obnoxious to public policy, which is best subserved by the greatest possible freedom in traffic. It is upon this ground of public policy that contracts in restraint of trade are held to be invalid.[4]

There are, however, certain classes of contracts which, though they impose restraints upon trade, are excepted from the operation of the general rule. Contracts by which the vendee agrees not to use the property acquired from the vendor in competition with the business retained by the latter constitute one of these classes.[5] Contracts of this nature are permitted; because their operation in en-

[10] George *v.* Smith (C. C.), 52 Fed. 830 (Canned Salmon and Canned Tomatoes and Peaches); Borden's Condensed Milk Co. *v.* Borden Ice Cream Co., 201 Fed. 510 (Ice Cream and Milk).

[11] See 4 VA. LAW REV. 75.

[1] It is not intended to review in this note any principles which may apply especially to contracts to control prices on resales of articles manufactured under patents and copyrighted books.

[2] 26 Stat. L. 209, c. 647, U. S. Comp. St., 1901, p. 3200.

[3] Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 226.

[4] Park & Sons Co. *v.* Hartman, 82 C. C. A. 158, 153 Fed. 24, 12 L. R. A. (N. S.) 135, 147. See United States *v.* Addyston Pipe & Steel Co., 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122.

[5] See note 4, *supra.*

couraging trade and commerce overbalances the resultant restraint upon trade, and it is in the interest of public policy to maintain their validity.[6] That contracts controlling prices on resales may be declared valid two conditions, it is said, must coexist: They must be merely ancillary to a principal lawful contract of sale; and they must impose no greater restraint than is reasonably necessary to protect the retailed business of the manufacturer.[7]

The cases prescribe no test for determining whether a particular contract is ancillary or principal. In reality, the very fact that such contracts follow and are subordinate to a contract of sale seems to stamp upon them the character of ancillary agreements. However, it has been strongly intimated that a test may be found in the ultimate purpose to be accomplished by the contract and the necessity to protect the retained buisness.[8] This is unsatisfactory upon its face. The purpose of the manufacturer in requiring the agreement not to resell below a certain price may be to protect the retained business, and such protection may be necessary—as where he also sells to retailers and the contract controlling prices on resales is with the jobber. On the other hand, the purpose of the contract may be merely to satisfy the arbitrary desire of the manufacturer to control prices on resales, without any necessity or purpose to protect the retained business. In either case, however, the agreement not to resell below a certain price is required by the manufacturer as a result of the contract of sale, and is subordinate thereto; in either case the contract of sale is the principal contract and the contract to control prices on resales is essentially ancillary.

Conceding that all such contracts are essentially ancillary to the contract of sale, their validity depends upon the sole consideration whether they are reasonable or not. On the other hand, all contracts to control prices and to suppress competition between parties who are otherwise strangers are essentially principal contracts in themselves, and are inherently unreasonable, and therefore in contravention of public policy and void.[9] There is present in this class of contracts no consideration of public policy to counteract the resultant restraint upon trade. Such a contract is presented in those

[6] "Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property. United States *v.* Addyston Pipe & Steel Co., *supra.*

[7] See note 4, *supra;* Miles Medical Co. *v.* Park & Sons Co., 220 U. S. 373, 404.

[8] Thus, in Park & Sons Co. *v.* Hartman, *supra*, it was said that, "The question as to whether the restraint was necessary to the retained business, and therefore ancillary to the principal purpose of the agreement * * *."

[9] Montague & Co. *v.* Lowry, 193 U. S. 38; Judd *v.* Harrington, 139 N. Y. 105.

cases where there is no contract of sale, but manufacturers, jobbers, or retailers of the same or similar articles agree among themselves to maintain certain prices. The purpose of the contracts may be to remove a ruinous competition and thus to protect the *business* —not a *retained business,* for nothing has been parted with—of the respective parties; but they are void, nevertheless, for it is the benefit of just this competition that public policy declares the public in general shall enjoy. If the parties carry it so far as to injure their own business it is a matter which concerns them only.

Whether an ancillary contract, in its terms or operation, is unreasonable because it extends over a longer time, or over a greater territory, or to essentially non-competing subsellers, or to other subjects than those susceptable of being used in competition with the retained business, cannot be ascertained by any accurately defined rule, but must be determined from a practical consideration of the circumstances of every case as it arises. In each case, it must be considered whether the restraint is only such as to afford a fair protection to the retained business, and not so large as to interfere with the interests of the public. If the contract imposes only such restraint as affords a reasonable and fair protection to the retained business, under the particular circumstances of the case, the contract is valid; otherwise it contravenes public policy, and is absolutely void.[10]

It was attempted to differentiate contracts governing prices on resales of articles manufactured under a secret process from like contracts where the articles were not so manufactured. The validity of contracts of the former class was urged before the courts on the ground that the manufacturer may make the articles and put them on the market or not as he chooses, and that, therefore, he should be permitted to affix conditions as to the prices at which they are to be disposed of on resales. While the contention received respectable support in some of the lower federal courts, it was wholly rejected by the United States Supreme Court. and the point thus finally settled so far as federal litigation is concerned.[11] It does not appear that the question has been raised before any state court.

The cases which have been most frequently before the courts are those in which a system of interlocking contracts is involved.

[10] Park & Sons Co. *v.* Hartman, *supra.* "With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee." Miles Medical Co. *v.* Park & Sons Co., *supra.*

[11] "If a manufacturer, in the absence of statutory privilege, has the control over the sales of the manufactured article, for which the complainant here contends, it is not because the process of manufacture is kept secret. In this respect, the maker of so-called proprietary medicines, unpatented, stands on no different footing from that of other manufacturers." Miles Medical Co. *v.* Park & Sons Co., *supra.*

Such a system was presented in the recent case of *Stewart* v. *Rawleigh Medical Co.* (Okla.), 159 Pac. 1187. The facts adduced in that case established that the Medical Company, who sold directly to the retailers, took from each retailer to whom it sold a contract by which the retailer agreed to sell all articles at the regular retail prices, which were to be indicated from time to time by the Medical Company. The Medical Company did not maintain retail establishments, and it was obvious that the retailers could not use the goods obtained in competition with the retained business of the Medical Company. The sole operation of the contracts was to oppress the retailer, without a corresponding benefit to the Medical Company, and to secure to the Medical Company an arbitrary control of prices on the retail market. The court properly held that the contract imposed an improper and unreasonable restraint upon trade and was, therefore, void under the federal Anti-Trust Act. It seems, however, that the reasoning in the opinion makes the nature of such contracts, as being ancillary or principal, depend upon the necessity for protection to the retained business, which, as indicated above, seems erroneous.

While the test to be applied in passing upon contracts to control prices should not be affected by the circumstance that a particular contract is not one of a general system, it seems to have been suggested that this fact may serve to reconcile some of the hostile decisions.[12] But this is plainly unsound; for, while a single contract in restraint of trade may not appreciably affect the public, it is equally as obnoxious on principle as one which forms a part of a general system and should be held invalid, unless it is ancillary to a principal contract of sale and reasonably necessary to protect the retained business.

IMPRISONMENT FOR REFUSAL TO EARN MEANS OF PAYING ALIMONY.—The peculiar power of a court of equity to enforce its decrees by contempt proceedings has been very generally exercised in giving effect to decrees for alimony. It has been strongly urged in opposition to this power that to commit one to prison for nonpayment of alimony where the defendant has sufficient funds in his possession is in contravention of the prohibition contained in most state constitutions against imprisonment for debt. This contention has been successfully refuted, however, both by reason of the fact that such punishment is applied because of the willful disobedience of a decree of the court,[1] and because a decree awarding alimony does not establish a mere technical debt within the meaning of such constitutional prohibitions but determines a legal duty

[12] This is probably the significance of the statement in Park & Sons Co. *v.* Hartman, *supra*, that, "The reasons which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate when there are a multitude of identical agreements. A single covenant might in no way affect the public interest, when a large number might."

[1] Blake *v.* People, 80 Ill. 11.